IMMETEC SENDIRIAN BERHAD

v.

YONG TAI HOONG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
TUAN LOW HOP BING JC
[SUIT NO. S2-22-252-94]
6 SEPTEMBER 1994

LAND LAW: Encroachment on land - Plaintiff is registered owner of land upon alienation by relevant authorities - Defendants reside in a wooden house which is situated in part of plaintiff's land - Plaintiff constructing block of flats on land - Area occupied by defendants to be used for constructing severage treatment plant to serve flats - Defendants refusing to give up vacant possession of wooden house and to remove goods and equipments stored in plaintiff's land - Whether defendant is gratuitous licensee - Right to remain - Plaintiff served quit notice on defendants - Whether defendants can claim adverse possession - Section 340 and 341 National Land Code - Interlocutory injunction sought by plaintiff.

The plaintiff applied by way of a summons in chambers for the following reliefs:

(a) an order that the defendants and their families vacate and leave the wooden house and the plaintiff's land forthwith;

(b) an order to restrain the defendants and their families from trespassing onto the plaintiff's land;

(c) an order that the defendants remove all their things including drums, iron pipes, signboards and other items together with heavy machinery from the plaintiff's land;

(d) an order to restrain the defendants, their servants, agents and families from storing any items on the plaintiff's land;

(e) an order to restrain the defendants, their agents servants and families from acting in any way to prevent or disrupt the building of an oxidation pond and other building works generally;

(f) costs; and

(g) any other relief.

Held:

[1] On the facts of the instant case, it is plain that the plaintiff has established a proprietary right to the land as its registered owner. The defendants have not established any right either in law or in equity to remain thereon but merely as squatters or trespassers. Therefore, the plaintiff is *ex debito justitiae* entitled to the injunction.

[2] The defendants as squatters obviously have no right to remain on the plaintiff's land. The first defendant as a gratuitous licensee also has no right to remain thereon when the plaintiff has served on him the notice to quit pursuant to the said allotment agreement.

[Plaintiff's application allowed with costs].

Cases referred to:
Ng Yee Fong & Anor. v. E.W. Talalla [1986] 1 MLJ 5 ***(foll)***
Wee Kang Whyte & Anor. v. Lee Woon Tong [1974] 1 MLJ 7 ***(refd)***
Shaik Alauddin v. Kamrutheen a/l Dawood [1988] 3 MLJ 336 ***(refd)***
Caltex Oil Malaysia Bhd. v. Tee Than Song [1969] 2 MLJ 184 ***(refd)***
Permodalan MBf Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors. [1988] 1 MLJ 178 [1988] 1 CLJ 31 ***(dist)***
Kumagai Gumi Co. Ltd. v. Zenecon-Kumagai Sdn. Bhd. [1994] 2 MLJ 789 ***(dist)***
Bohari Bin Taib & Ors. v. Pengarah Tanah Galian Selangor [1991] 1 MLJ 343 [1991] 1 CLJ 647 ***(refd)***
Cayman Development (Kedah) Sdn. Bhd. v. Puah [1990] 3 MLJ 110 ***(refd)***

Legislation referred to:
Limitation Ordinance 1953
National Land Code, ss. 340, 341
Rules of the High Court 1980, O. 81, O. 89, O. 92 r. 4

For the plaintiff - C.T. Siew; M/s. Abdullah, Ooi & Chan
For the defendant - Saran Singh; M/s. Saran Singh & Co.

JUDGMENT

Low Hop Bing JC:
In this application by way of a summons in chambers dated 25 June 1994 (Enclosure 3), the plaintiff applies for the following reliefs:

(a) an order that the defendants and their families vacate and leave the wooden house and the plaintiff's land forthwith;

(b) an order to restrain the defendants and their families from trespassing onto the plaintiff's land;

(c) an order that the defendants remove all their things including drums, iron pipes, signboards and other items together with heavy machinery from the plaintiff's land;

(d) an order to restrain the defendants, their servants, agents and families from storing any items on the plaintiff's land;

(e) an order to restrain the defendants, their agents, servants and families from acting in any way to prevent or disrupt the building of an oxidation pond and other building works generally;

(f) costs; and

(g) any other relief.

Plaintiff's Rights as Registered Owner

Unless otherwise stated to the contrary, the facts of the case are not disputed.

From 29 August 1987, upon alienation by the authorities, the plaintiff became the registered owner of the land held under HS(D) 55194 P.T. No. 881 Mukim Setapak, Wilayah Persekutuan ("plaintiff's land"). The plaintiff is constructing a block of flats and this construction has reached an advanced stage ("the said construction project").

The defendants reside in a wooden house at No. 19, Kampong Forlong, Setapak, 53000 Kuala Lumpur or "Lot 205" ("the said wooden house"), which is part of the plaintiff's land.

On 31 December 1990, a sale and purchase agreement was entered into between the plaintiff and the first defendant ("the said SPA").

On 9 June 1991, the plaintiff entered into an agreement with the first defendant whereby the first defendant has been allotted one unit of the flat at RM25,000 ("the said allotment agreement") and it was agreed, *inter alia*, that the defendants shall leave the said wooden house upon being given the notice to quit issued by the plaintiff. The defendants have in March 1994 started storing goods and equipment in the area of the said wooden house without the consent of the plaintiff. This area around the said wooden house is to be used for the purpose of constructing a sewerage treatment plant to serve the flats ("the said plant"). The refusal of the defendant to give up vacant possession of the said wooden house and to remove the goods and equipment stored on the plaintiff's land has resulted in the plaintiff's inability to build the said plant and hence the consequential inability of the plaintiff to complete the said construction project as a whole.

It was contended by the plaintiff that the conduct of the defendants is intended to pressurise the plaintiff into paying compensation to the defendants, as has been stated in the defendant's letter dated 28 February 1994 in which the defendants claimed a sum of RM67,400 as compensation.

On 23 March 1994, the plaintiff required the defendants to remove their goods and equipment from the plaintiff's land, but the defendants refused to do so.

On 5 April 1994 and 7 April 1994 the plaintiff required the first and the second defendants respectively to give up vacant possession of the said wooden house pursuant to the said allotment agreement.

The grounds relied upon by the plaintiff are as follows:

(a) if the said plant is not constructed, the said construction project would be affected and could not be completed on time;

(b) approval for the construction of the said plant has been given by the relevant authorities and the tender to construct the same has been awarded to the contractor;

(c) the refusal of the defendants to give up vacant possession of the said wooden house and the goods and equipment on the plaintiff's land has resulted in the inability of the plaintiff to give site possession to the contractor who in turn cannot commence the construction of the said plant.

(d) the plaintiff is the registered owner and the defendants have stayed in the said wooden house as gratuitous licensees and the licence has been withdrawn upon being served with the notice to quit on 5 and 7 April 1994 respectively.

Having perused the affidavits filed herein, I find that pursuant to the said allotment agreement, the first defendant has agreed that he could only stay in the said wooden house on condition, *inter alia*, that upon the completion of the flats or upon being given the notice to quit, the first defendant shall give up immediate vacant possession. The first defendant had been allowed to stay on the plaintiff's land as a gratuitous licensee. The allotment agreement is obviously in anticipation of the plaintiff's requirement to use the plaintiff's land for the said construction project. Notices to quit dated 5 and 7 April 1994 have been given by the plaintiff to the defendants respectively, thereby withdrawing the licence given to the defendants to occupy the plaintiff's land. In the said allotment

agreement, it was expressly stated that the first defendant is a squatter. At all material times, the second defendant has also been a squatter. For the occupation of the plaintiff's land, both the defendants have never paid nor promised to pay rental or any other form of payment whatsoever to the plaintiff.

On the facts of the instant case, it is plain that the plaintiff has established a proprietary right to the land as its registered owner. The defendants have not established any right either in law or in equity to remain thereon but merely as squatters or trespassers. Therefore, the plaintiff is *ex debito justitiae* entitled to the injunction: (See *Ng Yee Fong & Anor. v. E.W. Talalla* [1986] 1 MLJ 5, a Supreme Court decision).

Defendants' Rights as Gratuitous Licensees and/or Trespassers

Learned Counsel for the defendants submits that:

(i) The defendants and their families have been staying and occupying the premises for the last 40 years.

(ii) The defendants have occupied the land with the permission and/or consent or full knowledge of the previous owner.

(iii) The plaintiff only became the owner sometime in 1987.

(iv) The plaintiff is aware of all the occupiers of the premises. The said allotment agreement has nothing to do with the second defendant and/or other occupiers (18 in all). After the execution of the said allotment agreement the plaintiff had committed a breach thereof by failing to allot a unit and/or complete the unit in time and/or pay compensation and/or follow the terms and conditions thereof.

(v) All these years, the defendants and their families have improved the land and renovated the said house.

It was submitted on behalf of the plaintiff that the defendants were gratuitous licensees and/or trespassers and that no one, including the previous owner (the Government) has ever given them permission to remain on the plaintiff's land.

Having regard to the submissions from both the learned Counsel, my considered view is that under s. 340 of the National Land Code 1965 (NLC), the indefeasibility of title of a registered owner is assured. The plaintiff became the registered owner of the land in 1987. Prior to that, the land was owned by the Government. There is no evidence to support the defendants' claim that the previous owner has given them permission to remain on the plaintiff's land. The fact that the defendant has been staying and occupying the premises for the last 40 years does not affect the title of the plaintiff as the registered owner because the defendants cannot claim adverse possession. Section 341 of the National Land Code provides as follows:

> Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein, and accordingly, the Limitation Ordinance 1953, shall in no circumstances operate to extinguish any title to, or interest in, land.

The status of the defendants, *vis-a-vis* the plaintiff was that of squatters. This fact has been admitted by the defendants.

The defendants as squatters obviously have no right to remain on the plaintiff's land. Further the first defendant as a gratuitous licensee has also no right to remain thereon

when the plaintiff has served on him the notice to quit pursuant to the said allotment agreement thereby withdrawing the licence, which was the basis on which the first defendant claims to be entitled to remain on the plaintiff's land.

Further support of my finding may be found in *Wee Kang Whyte & Anor. v. Lee Woon Tong* [1974] 1 MLJ 7 and *Shaik Alauddin v. Kamrutheen a/l Dawood* [1988] 3 MLJ 336.

In *Wee Kang Whyte & Anor. v. Lee Woon Tong* [1974] 1 MLJ 7, the defendant was permitted to occupy the plaintiff's land and to build a temporary structure on it on condition that he had to vacate the place without any compensation when requested to do so. The plaintiff agreed to sell the property with vacant possession and offered the defendant RM5,000 as compensation to move out. The defendant apparently agreed to accept the RM5,000 and to vacate but subsequently changed his mind and refused to move out. The plaintiffs thereupon brought an action for possession. Choor Singh J. held:

(1) the plaintiffs in this case had granted the defendant a temporary gratuitous licence which they were entitled to revoke at will. The defendant acquired no rights at all, either in law or in equity.

(2) the plaintiffs were therefore entitled to an order of possession against the defendant.

Similarly, in the instant case, the first defendant as a squatter has expressly agreed in the said allotment agreement to vacate the said wooden house upon being given notice which has indeed been given. Further, one unit of flat has been allotted to him. The right of the defendants to remain on the plaintiff's land is terminated when the defendants received the notice to quit since the gratuitous licence can be revoked at will.

In *Shaik Alauddin v. Kamrutheen a/l Dawood* [1988] 3 MLJ 336 there was an application by the plaintiff for summary judgment for:

(a) an injunction to restrain the defendant by himself, his servants and/or agents from trespassing and/or remaining in possession of the premises No. 73, Jalan Mahkota, Kuantan;

(b) delivering of vacant possession of said premises;

(c) inquiry as to damages; and

(d) costs.

The plaintiff was partner of a firm managed by the defendant in the said premises. By a deed of assignment dated 28 September 1983, the plaintiff became the tenant of the said premises. Pursuant to an agreement dated 17 May 1986, the plaintiff and other partners of the firm withdrew from the said firm in favour of the defendant. **It was a term of the agreement that the defendant would vacate and deliver possession of the said premises on or before 31 December 1986.** The defendant in breach of this agreement refused to vacate and deliver possession and continued to be in occupation.

Lamin J. (as he then was) held, *inter alia*, from the facts of the case, no tenancy of any kind was intended to be created in favour of the defendant before 31 December 1986. Thereafter he became a trespasser. The defendant was given only a personal privilege to remain just to give him time to make all the preparations to leave and hence the Court saw no reason why an injunction cannot be issued.

Balance of Convenience

In respect of the interlocutory injunction sought by the plaintiff as one of the reliefs in this application, I agree with the submission of the learned Counsel for the plaintiff that the balance of convenience is in favour of the plaintiff e.g.:

(a) the prejudice and damage to the plaintiff if the defendants do not vacate the said wooden house and remove the goods and equipment would be enormous. The said plant which is so essential in the said construction project could not be completed and therefore the plaintiff is in no position to comply with the term and condition of the said SPA to deliver the flats to the purchasers, including the first defendant. There would also be damage to the reputation of the plaintiff as a housing developer.

(b) On the other hand, if the defendant gives up vacant possession to the plaintiff, the plaintiff would be in a position to complete the said construction project and to deliver the unit of flat to the first defendant, who in any event can be compensated in damages, for which an undertaking has been given by the plaintiff: *Caltex Oil Malaysia Bhd. v. Tee Than Song* [1969] 2 MLJ 184. In that case, the plaintiffs applied for interlocutory injunction to restrain the defendant, his servants, agents and any person holding through or under him from remaining on or upon the service station of the plaintiffs and from removing any or all of the equipment on the said premises. The plaintiffs were the owners of the premises and had given a licence to the defendants to carry on the retail sale of the plaintiff's products at the service station on the condition that the licence may be terminated by either party on giving to the other party thirty days previous notice in writing. The plaintiff by notice in writing cancelled the licence. The defendant received the said notice but refused to comply with the terms. The plaintiffs claimed that they have suffered irreparable damage in that they have been deprived of the use of the said premises and service station and they will continue to suffer damage both financially and in reputation. The defendant alleged the plaintiffs will not suffer irreparable damage and gave reasons for his allegations. The Court held that as irreparable damage both in terms of money and reputation would be occasioned to the plaintiffs if the defendant were allowed to remain on the premises, the interlocutory injunction would be granted.

Is the Procedure in this Application Wrong?

It was submitted on behalf of the defendants that the procedure used in the plaintiff's application is wrong on the following grounds:

(i) The plaintiff has only named 2 defendants although the plaintiff is aware of the particulars of the 18 occupiers.

(ii) The plaintiff alleges that the defendants are squatters and to obtain vacant possession, the plaintiff ought to apply under O. 89 of the Rules of High Court 1980.

(iii) The Court should not invoke O. 92, r. 4 and cited in support thereof two cases, *viz, Permodalan MBf Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah and Ors.* [1988] 1 MLJ 178 and *Kumagai Gumi Co. Ltd. v. Zenecon-Kumagai Sdn. Bhd.* [1994] 2 MLJ 789.

For the plaintiff, it was submitted that the procedure adopted by the plaintiff is correct.

Upon a proper perusal of the rules, it is my considered view that the procedure adopted by the plaintiff herein is in accordance with the rules. In this application, it is not

obligatory for the plaintiff to invoke O. 89. In *Bohari Bin Taib & Ors. v. Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 the limits of proceedings under O. 89 were laid down by the Supreme Court. In delivering the judgment of the Court, Mohamed Azmi SCJ said at page 346:

> In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, land occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different.

Further, O. 89 does not prescribe a mandatory provision. It provides that:

> Where a person claims possession of land which he alleges is occupied solely by a person or (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings **may be brought** (emphasis added) by originating summons in accordance with the provisions of this order.

I have also considered the authorities cited by learned Counsel for the defendants and hold that they are of no assistance to the defendants because they can be distinguished e.g.:

(i) In *Permodalan MBf v. Tan Sri Datuk Seri Hamzah Abu Samah, supra*, the issue is whether the Court has the jurisdiction to stay or suspend execution of an injunction; and

(ii) In *Kumagai Gumi v. Zenecon-Kumagai, supra,* the subject matter is basically founded upon the principles of winding-up of companies.

Still on a point of procedure, it was further submitted for the defendants that:

(i) Plaintiff's application would dispose off the whole suit and so the plaintiffs ought to include a prayer for specific performance of said agreement under O. 81.

(ii) The reliefs sought by the plaintiff ought not to be granted because they are only ancillary and/or consequential on the grant of specific performance.

For the plaintiff, it was submitted that since there is no prayer for specific performance, O. 81 need not be invoked.

Order 81 reads as follows:

1.(1) In any action begun by writ indorsed with a claim:

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or

(b) for rescission of such an agreement; or

(c) for the forfeiture or return of any deposit made under such an agreement;

the plaintiff **may**, on the ground that the defendant has no defence to the action, apply to the Court for judgment;.

In my considered opinion, as in the case of O. 89, O. 81 is also not mandatory and a party is at liberty to invoke the procedural rules which will bring about the best advantage to him, so long as the facts of his case come within the prescribed requirements of the rules.

On the submission that the reliefs sought at an interlocutory stage are the same or practically the same as those sought in the main suit, and therefore the whole suit is disposed off, I hold that each case must be decided on its own merits. The balance of convenience in all the circumstances are important and should be considered by the Court.

In *Cayman Development (Kedah) Sdn. Bhd. v. Puah* [1990] 3 MLJ 110 K.C. Vohrah J. held that:

> An injunction may be granted even if it would give the plaintiff the whole remedy before the action is tried where plainly there is no defence to the action and the only object in raising the defence is to cause delay.

Delay

Learned Counsel for the defendants raised the issue that the plaintiff has occasioned considerable delay in its application for equitable relief and delay defeats equity.

The plaintiff's learned Counsel submitted that there has been no delay on the plaintiff's part.

In deciding whether there has been any delay on the part of the plaintiff, I find that the following facts and events are crucial *viz*:

(a) 9 June 1991 is the date of the said allotment agreement whereby the plaintiff allowed the first defendant to occupy the said wooden house subject to a notice to vacate the same.

(b) On 5 April 1994, the said notice was given to the first defendant.

(c) On 9 May 1994, this suit was filed.

(d) On 27 May 1994, permission was given by the authorities to proceed with the building of the said plant.

(e) On 2 June 1994, the contract to build the said plant was awarded.

(f) On 9 June 1994, site possession was to be given to the contractor.

(g) On 25 June 1994, this application for injunction was filed.

In the circumstances, I find that there is no delay on the plaintiff's part since the application for injunction was filed soon after the notice to quit was given. The plaintiff has therefore acted expeditiously and timeously.

Has the Plaintiff Come to Equity with Clean Hands?

Finally, it was submitted for the defendants that the plaintiff in seeking equitable relief has not come to equity with clean hands, on the ground that the plaintiff was in breach of the said allotment agreement by not alloting the unit of flat to the defendants. The flat, it was further submitted, was to be completed within 36 months pursuant to the said SPA but the plaintiff has not completed within the time frame and the plaintiff has not paid the defendant damages for late delivery.

The plaintiff, on the other hand, replied as follows:

(a) There is absolutely no evidence of the lack of good faith on the part of the plaintiff. In fact, the plaintiff allowed the first defendant to occupy the said wooden house until such time as a notice to vacate was issued, *vide* the said allotment agreement.

(b) There was in fact an allotment of one unit of flat to the first defendant. The statement that the unit had not been allotted is in direct contradiction with a further statement that the unit had not been completed.

(c) The fact that the allotted unit has not been completed is irrelevant *vis-a-vis* the question of "clean hand". Further, if the defendants vacate the said wooden house and remove their equipment from the plaintiff's land, the said construction project including the first defendant's unit could be completed.

Having regard to these submissions, I find that the plaintiff's conduct did not amount to any unclean hand. The inability of the plaintiff to allot the unit of flat intended for the first defendant was actually bought about by the unwillingness or refusal of the defendants to give up vacant possession, thereby causing a failure on the part of the plaintiff to complete the said construction project for the benefit of all the purchasers including the defendants. Further, the first defendant's claim for liquidated damages arising out of the plaintiff's inability to deliver the unit of flat to the defendant is a matter which the first defendant is entitled to pursue by way of proper legal proceedings in due course when liquidated damages can be quantified.

On the totality of the foregoing grounds, I make an order in terms of this application, with costs to the plaintiff.